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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

BERKLEY INSURANCE COMPANY,

Plaintiff,

vs.

NLC GENERAL, INC.; NLE, LLC; RH
MECHANICAL, INC.; TACTICAL
CONSTRUCTORS CORPORATION.; FETS,
LLC; BRIAN H. BARNEY; STEPHANIE K.
BARNEY; STEVEN B. FITCH; RACHAEL
CORINA FITCH; RYAN M. HOLZ; ERIC A.
HOLZ; MARGARET HOLZ; JEFFREY S.
BARNEY; REGENA S. BARNEY; MICHAEL G.
HOLZ; JACQUELINE U. HOLZ, individually,

Defendants.

Case No. 3:16-cv _____

INDEMNITY COMPLAINT

COMES NOW Plaintiff, Berkley Insurance Company (“Berkley” or “Surety”), by counsel, Law Offices of Charles G. Evans, and for its indemnity complaint against Defendants, NLC General, Inc., NLE, LLC, RH Mechanical, Inc., Tactical Constructors Corporation, Brian H. Barney, Stephanie K. Barney, Steven B. Fitch, Rachael C. Fitch, Ryan M. Holz, Eric A. Holz, Margaret Holz, Jeffrey S. Barney, Regena S. Barney, Michael G. Holz, Jacqueline U. Holz,, (collectively, “Indemnitors”), and Fets, LLC, states and alleges as follows:

BACKGROUND

1. This is a complaint to enforce a General Agreement of Indemnity signed by the Defendants on August 20, 2014, who agreed to bind themselves jointly and severally for the benefit of Berkley, as Surety.
2. Berkley issued a performance and payment bond no. 0187950, the principal of which was Tactical Constructors Corporation, effective January 23, 2015 in the penal sum of \$657,778.00 to the Obligee, the City of Aberdeen, Washington. A true and correct copy of the Bond is attached as Exhibit 1.
3. In order to induce Berkley to issue the Bond number 0187950, NLC General, Inc., NLE, LLC, RH Mechanical, Inc., Tactical Constructors Corporation a/k/a Tactical Constructors Corp., Brian H. Barney, a/k/a Brian Barney, Stephanie K. Barney, a/k/a Stephanie Barney, Steven B. Fitch, a/k/a Steve Fitch, Rachael C. Fitch, a/k/a Rachael Corrina Fitch a/k/a Corina Fitch, Ryan M. Holz, a/k/a Ryan Holz, Eric A. Holz, a/k/a Eric Holz, Margaret Holz, Jeffrey S. Barney a/k/a Jeffrey Barney a/k/a Jeff Barney, Regena S. Barney, a/k/a Regena Barney, Michael G. Holz, a/k/a Mike Holz, and Jacqueline U. Holz, a/k/a Jackie Holz, individually and collectively hereafter referred to as the “Indemnitors”, on August 20, 2014, executed the General Agreement of Indemnity. A true and correct copy of the Indemnity Agreement is attached as Exhibit 2.

JURISDICTION, VENUE, AND PARTIES

4. Berkley reincorporates allegations 1 through 3 as though contained herein.
5. Berkley is a corporation organized under the laws of Delaware and has its principal place of business in Connecticut. Berkley is a citizen of Delaware and Connecticut.
6. Berkley maintains no offices in the State of Alaska.

7. Defendant NLC General, Inc., is an Alaska corporation in good standing registered to do business in the state of Alaska. NLC General, Inc., is a citizen of the State of Alaska.
8. NLE, LLC is an Alaska limited liability company in good standing registered to do business in the state of Alaska. NLE, LLC is a citizen of the State of Alaska.
9. RH Mechanical, Inc., is an Alaska corporation in good standing registered to do business in the state of Alaska. RH Mechanical, Inc., is a citizen of the State of Alaska.
10. Tactical Constructors Corp. is an Alaska corporation in good standing registered to do business in the state of Alaska. Tactical Constructors Corp., is a citizen of the State of Alaska.
11. Fets, LLC is a limited liability company, organized under the laws of the State of Alaska and prior to its involuntary dissolution on July 21, 2011, was owned 100% by Jeffrey S. Barney. Fets, LLC is a citizen of the State of Alaska.
12. Fets, LLC is the alter ego of Jeffrey S. Barney.
13. On information and belief, Defendants Brian H. Barney, Stephanie K. Barney, Steven B. Fitch, Rachael C. Fitch, Ryan M. Holz, Jeffrey S. Barney, Regena S. Barney, Michael G. Holz, and Jacqueline U. Holz reside in Fairbanks, Alaska. Defendants Brian H. Barney and Stephanie K. Barney Steven B. Fitch, Rachael C. Fitch, Ryan M. Holz, Jeffrey S. Barney, Regena S. Barney, Michael G. Holz, and Jacqueline U. Holz are citizens of the State of Alaska.
14. Defendants Eric A. Holz and Margaret Holz reside in Port Orchard Washington. Defendants Eric A. Holz and Margaret Holz are citizens of the State of Washington.
15. The amounts in controversy exceed \$75,000.00, exclusive of interest and costs.
16. The Court has jurisdiction over this matter under 28 U.S.C. §1332, as complete diversity exists between Berkley, Fets, LLC, and the Indemnitors.

GENERAL ALLEGATIONS

17. The GAI by its terms in Article 1, 1.01, obligates Indemnitors to “jointly and severally exonerate, hold harmless, indemnify and keep indemnified the Surety from and against any and all liability, loss, costs, damages, attorneys' fees and expenses, of whatever kind or nature, heretofore or hereafter sustained or incurred by the Surety by reason, or in consequence of its executing any such Bond.”
18. Numerous claims were made against Payment Bond No. 0187950 due to the failure of Indemnitors to pay for materials, supplies, labor, or equipment.
19. The GAI, by its terms in Article 1, 1.02, obligates the Indemnitors, to “pay to the Surety upon demand an amount sufficient to discharge any claim made against the Surety on any Bond or Bonds.”
20. Bayview Redi Mix, Inc. (“Bayview”), sued Berkley in the Superior Court of Washington for Grays Harbor, case no. 16-2-65-3.
21. Berkley paid Bayview \$74,794.33 in exchange for a complete release of Bayview’s claim against Berkley. The Indemnitors should have paid this amount.
22. Northwest Rock, Inc. (“Northwest”), sued Berkley in the Superior Court of Washington for Grays Harbor, case no. 16-2-64-5.
23. Berkley paid Northwest \$26,024.10 in exchange for a complete release of Northwest’s claim against Berkley. The Indemnitors should have paid this amount.
24. Rognlin's, Inc. (“Rognlin’s”), sued Berkley in the Superior Court of Washington for Grays Harbor, case no. 16-2-63-7.

25. Berkley paid Rognlin's \$103,825.72 in exchange for a complete release of Rognlin's claim against Berkley. This amount should have been paid by the Indemnitors.
26. Berglund, Schmidt & Associates, Inc. ("Berglund") on November 23, 2015 filed a claim against Berkeley and bond 0187950 in the amount of \$9,523.25.
27. Evergreen Concrete Cutting, Inc. ("Evergreen") filed a claim against Berkley and its Bond, No. 0187950.
28. Berkley paid Evergreen \$205,300.35 in exchange for a complete release of Evergreen's claim against Berkley. This amount should have been paid by the Indemnitors.
29. Lakeside Industries, Inc. ("Lakeside") on December 8, 2015 filed a claim against Berkley and the bond 0187950 in the amount of \$72,715.50.
30. Valley Supply Co. ("Valley") filed a claim against Berkley and its Bond, No. 0187950 on December 11, 2015.
31. Berkley paid Valley \$44,639.55 in exchange for a complete release of all claims against Berkley and its Bond No. 0187950.
32. As of July 31, 2016, Berkley has incurred direct and contingent losses in an amount not less than \$536,822.80 by reason of having issued bond 0187950, for which the Indemnitors are liable to Berkley, the exact amount to be proven at trial.
33. Berkley continues to incur losses by reason of having issued bond 0187950.
34. As of July 31, 2016, Berkley has incurred costs and attorneys' fees in an amount not less than \$13,919.00.
35. Jeffrey S. Barney and Regena S. Barney own real property located in Fairbanks, Alaska described as:

LOTS 2A and 2B, Trigger Subdivision, according to the official plat thereof, filed under plat no. 2011-83 records of the Fairbanks Recording District, Fourth Judicial District, State of Alaska.

36. Brian Barney owns real property located in Fairbanks, Alaska described as:

TRACT B on the Plat entitled "Plat 2000-69 filed August 3, 2000, Record of Survey within Mineral Survey No. 2431, Spruce #4" and dated July 27, 2000" records of the Fairbanks Recording District, Fourth Judicial District, State of Alaska.

37. Steven B. Fitch and Rachel C. Fitch own real property located in Fairbanks, Alaska described as:

LOT 7 in BLOCK 3 of Alaska State Land Survey No. 81-56 DUNE LAKE SUBDIVISION, containing 4.962 acres, more or less, according to the amended survey plat filed in the Fairbanks recording district on August 9, 1982 as Plat 82-112;

and

LOT 9 in BLOCK 3 of Alaska State Land Survey No. 81-56 DUNE LAKE SUBDIVISION, containing 4.943 acres, more or less, according to the amended survey plat filed in the Fairbanks recording district on August 9, 1982 as Plat 82-112.

38. Fet's, LLC, owns real property located in Fairbanks, Alaska described as:

LOTS 1, 2, and 3, SADCO INDUSTRIAL PARK, FIRST ADDITION, According to the official plat thereof, filed under Plat No. 85-53, records of the Fairbanks Recording District, Fourth Judicial District, State of Alaska

39. Ryan Holz owns real property located in Fairbanks, Alaska described as:

LOT 19A2, BLOCK FIVE (5), CHENA MARINA SUBDIVISION, SECOND ADDITION, according to the replat filed July 28, 2006 as Plat Number 2006-126; records of the Fairbanks Recording District, Fourth Judicial District, State of Alaska.

**COUNT I - BREACH OF INDEMNITY CONTRACT; FAILURE TO INDEMNIFY
AND HOLD HARMLESS**

40. Berkley reincorporates allegations 1 through 39 as though contained herein.

41. NLC General, Inc., NLE, LLC, RH Mechanical, Inc., Tactical Constructors Corp., Brian H. Barney, Stephanie K. Barney, Steven B. Fitch, Rachael C. Fitch, Ryan M. Holz, Eric A. Holz, Margaret Holz, Jeffrey S. Barney, Regena S. Barney, Michael G. Holz, and Jacqueline U. Holz, jointly and severally, agreed to indemnify and hold Berkley harmless from any and all liability, loss, claims, demands, costs, damages, attorneys' fees and expenses of whatever kind and nature, together with interest thereon at the maximum rate allowed by law, which Surety may sustain or incur by reason of or in consequence of the execution by Surety of any Bond.

42. Indemnitors, jointly and severally, agreed to indemnify Berkley with respect to liability incurred or expenses paid in connection with claims relating to a bonded obligation, including without limitation, attorneys' fees and all legal expenses related to the adjustment of claims or expenses.

43. Berkley has demanded that the Indemnitors indemnify and hold it harmless from any and all losses incurred by reason of the issuance of the Bond.

44. The Indemnitors have failed, refused and neglected to indemnify and hold Berkley harmless.

45. The Indemnitors' failure to indemnify and hold Berkley harmless is a direct and proximate cause of Berkley's losses, in an aggregate amount not less than \$550,741.80, the exact amount to be proven at trial.

46. Berkley continues to incur further losses and expenses, including actual attorneys' fees, for which the Indemnitors are liable to Berkley, the exact amount to be proven at trial.

COUNT II - EXONERATION AND *QUIA TIMET*

47. Berkley reincorporates allegations 1 through 46 as though contained herein.

48. Berkley has demanded that Indemnitors indemnify and hold it harmless from its payments

and losses of \$550,741.80 on bond number 0187950 and to post sufficient collateral to discharge and pay the losses and payments to date.

49. Indemnitors are liable to Berkley for damages caused by their failure to grant the collateral demands of Berkley.

50. Indemnitors have failed or refused to meet their obligations to indemnify, exonerate and place Berkley in funds or security necessary and sufficient to pay and secure payments and losses of not less than \$550,741.80 and to post collateral in such amount. Berkley is entitled to funds and collateral of the Indemnitors in at least the amount of \$550,741.80 by rights of exoneration and *quia timet* pursuant to common law.

51. Berkley is entitled to a prejudgment judicial lien in an amount not less than \$550,741.80 against personal property and real property owned legally and/or beneficially by Indemnitors, more particularly described in paragraphs 35 through 39 of this complaint.

COUNT III - SPECIFIC PERFORMANCE

52. Berkley realleges the allegations contained in paragraphs 1 through 51 as though contained herein.

53. Berkley has demanded that Indemnitors indemnify and hold Berkley harmless from all costs and losses paid on bond number 01879506 and to post collateral security for use by Berkley in securing and paying the amounts incurred as a result of having issued bond number 0187950.

54. To date, Indemnitors have failed to indemnify and hold Berkley harmless and to post collateral security in the amount of \$550,741.80.

55. To date, Indemnitors have failed to post collateral security with Berkley for its use in securing, paying and discharging if necessary the obligations incurred as a result of having issued

bond number 0187950.

56. Berkley lacks an adequate remedy at law or will suffer irreparable harm if relief is not granted for the deposit of funds or collateral to indemnify, exonerate and hold Berkley harmless from its payments and losses pursuant to bond number 0187950.

57. Berkley is entitled to specific performance requiring Indemnitors to place Berkley in funds and collateral in an amount not less than \$550,741.80.

58. Berkley is entitled to a judicial lien for at least the amount of \$550,741.80 against the described real property identified in paragraphs 35 through 39 of this complaint. Berkley is entitled to a judicial lien or attachment against cash and personal property of the Indemnitors such that the value of the equity in the real property and in the cash and personal property which are subject to judicial liens is not less than \$550,741.80.

WHEREFORE, Berkley prays for relief as follows:

1. For judgment against Defendants, NLC General, Inc., NLE, LLC, RH Mechanical, Inc., Tactical Constructors Corp., Fets, LLC, Brian H. Barney, Stephanie K. Barney, Steven B. Fitch, Rachael C. Fitch, Ryan M. Holz, Eric A. Holz, Margaret Holz, Jeffrey S. Barney, Regena S. Barney, Michael G. Holz, and Jacqueline U. Holz, jointly and severally, in a principal amount not less than \$550,741.80 plus costs, interest, and actual attorney fees pursuant the indemnity agreement, the exact amount to be proven at trial.
2. Requiring Indemnitors to post funds and collateral in an amount sufficient to secure Berkley from any losses, and

3. For a judicial prejudgment lien against the properties identified in paragraphs 35 through 39 of this complaint, and in the cash and personal property of the Defendants in an amount of not less than \$550,741.80.
4. Any additional losses incurred on the bonds up to the date of trial.
5. For such further relief as the Court deems just and equitable.

Dated this 12th day of August, 2016.

LAW OFFICES OF CHARLES G. EVANS
Attorneys for Berkley Insurance Company

By: /s/ Charles G. Evans
Charles G. Evans, ABA No. 7705019
Corey Stewart, ABA No. 1202003